

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DANIEL POULIN,)	
)	
Petitioner,)	
)	
v.)	1:08-cr-00050-JAW
)	
)	
UNITED STATES OF AMERICA,)	
)	
Respondent)	

RECOMMENDED DECISION ON 28 U.S.C. § 2255 MOTION

Petitioner Daniel Poulin has filed a motion entitled “Supporting Memorandum For A Second In Time Motion Under § 2255(F)(4),” which filing the Court has construed as a motion filed pursuant to 28 U.S.C. § 2255, to correct his sentence.¹ (ECF No. 353.) Petitioner previously filed a motion pursuant to § 2255. Petitioner filed his first section 2255 motion on April 6, 2012; the Court denied relief on the merits, *Poulin v. United States*, Nos. 1:08-cr-00050-JAW, 1:12-cv-00114-JAW (D. Me. Jan. 15, 2014) (Order, ECF No. 293; Recommended Decision, ECF No. 288), and the First Circuit denied a certificate of appealability, *United States v. Poulin*, No. 14-1221 (1st Cir. June 2, 2015) (ECF No. 321).

This Court lacks jurisdiction to consider a second or successive section 2255 motion unless the First Circuit has specifically authorized the Court to consider it. Section 2244

¹ Petitioner was convicted in 2010 of one count of production of child pornography, 18 U.S.C. §§ 2251(a) and (e). The Court sentenced Petitioner to a prison term of 180 months, to be followed by a 10-year term of supervised release. (Judgment, ECF No. 190.)

applies to second or successive section 2255 motions, pursuant to section 2255(h). Section 2244(b)(3)(A) states: “Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.” *See also* First Circuit Rule 22.1. The First Circuit has held: “We have interpreted [section 2255(h)] as ‘stripping the district court of jurisdiction over a second or successive habeas petition unless and until the court of appeals has decreed that it may go forward.’” *Trenkler v. United States*, 536 F.3d 85, 96 (1st Cir. 2008) (quoting *Pratt v. United States*, 129 F.3d 54, 57 (1st Cir. 1997)). A review of the record reveals that Petitioner apparently has not applied to the First Circuit for permission to file the pending second or successive motion. *See* 28 U.S.C. §§ 2244, 2255.

Because the record lacks any evidence that the First Circuit has authorized Petitioner to proceed on the pending motion, the Court is without jurisdiction to consider the merits of the motion. First Circuit Rule 22.1(e) provides that if a second or successive section 2255 petition is filed in the district court without the required authorization from the First Circuit, the district court “will transfer the petition to the court of appeals pursuant to 28 U.S.C. § 1631 or dismiss the petition.”² The issue, therefore, is whether the Court should dismiss or transfer the matter.

² Title 28 U.S.C. § 1631 states:

Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or

Here, Petitioner contends he filed the motion within one year of his discovery of certain relevant facts and, therefore, he filed the motion timely.³ To avoid any prejudice to Petitioner's ability to assert his claim in the event the First Circuit authorizes Petitioner to proceed, transfer is appropriate.⁴

CONCLUSION

Based on the foregoing analysis, I recommend the Court transfer the pending section 2255 motion to the First Circuit, pursuant to 28 U.S.C. § 1631 and First Circuit Rule 22.1(e). I further recommend that the Court deny a certificate of appealability pursuant to

appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

First Circuit Rule 22.1(e) states:

If a second or successive § 2254 or § 2255 petition is filed in a district court without the requisite authorization by the court of appeals pursuant to 28 U.S.C. § 2244(b)(3), the district court will transfer the petition to the court of appeals pursuant to 28 U.S.C. § 1631 or dismiss the petition. If the petition is transferred, the petitioner must file a motion meeting the substantive requirements of Loc. R. 22.1(a) within 45 days of the date of notice from the clerk of the court of appeals that said motion is required. If the motion is not timely filed, the court will enter an order denying authorization for the § 2254 or § 2255 petition.

³ Although Petitioner cites 28 U.S.C. § 2255(f)(4) as the authority for his filing, § 2255(h)(1) provides that a second or successive § 2255 motion could be authorized if it contains “newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense.” 28 U.S.C. § 2255(h)(1).

⁴ Because the transfer statute, 28 U.S.C. § 1631, specifically provides that the “action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred,” the transfer recommendation anticipates that if the First Circuit authorizes Petitioner's second or successive section 2255 motion after the expiration of the one-year limitation period, Petitioner's section 2255 motion would be reinstated to this Court's docket and would be considered to have been timely filed.

Rule 11 of the Rules Governing Section 2255 Cases because there is no substantial showing of the denial of a constitutional right within the meaning of 28 U.S.C. § 2253(c)(2).

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within fourteen (14) days of being served with a copy thereof. A responsive memorandum shall be filed within fourteen (14) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

/s/ John C. Nivison
U.S. Magistrate Judge

Dated this 7th day of September, 2017.